



Senate

General Assembly

File No. 331

January Session, 2011

Substitute Senate Bill No. 973

Senate, April 4, 2011

The Committee on Human Services reported through SEN. MUSTO of the 22nd Dist., Chairperson of the Committee on the part of the Senate, that the substitute bill ought to pass.

***AN ACT CONCERNING THE DETERMINATION OF UNDUE
HARDSHIP FOR PURPOSES OF MEDICAID ELIGIBILITY.***

Be it enacted by the Senate and House of Representatives in General Assembly convened:

1 Section 1. (NEW) (*Effective July 1, 2011*) (a) Except as provided in
2 subsection (c) of this section, the Commissioner of Social Services shall
3 waive the imposition of a penalty period pursuant to subsection (a) of
4 section 17b-261 of the general statutes or subsection (a) of section 17b-
5 261a of the general statutes if such imposition would create an undue
6 hardship.

7 (b) For purposes of this section, "undue hardship" exists when (1)
8 the life or health of the applicant would be endangered by the
9 deprivation of medical care, or the applicant would be deprived of
10 food, clothing, shelter or other necessities of life, (2) the applicant is
11 otherwise eligible for medical assistance under section 17b-261 of the
12 general statutes but for the imposition of the penalty period, (3) if the
13 applicant is receiving long-term care services at the time of the
14 imposition of a penalty period, the provider of long-term care services

15 has notified the applicant that such provider intends to discontinue
16 providing long-term care services to the applicant because of
17 nonpayment, (4) if the applicant is not receiving long-term care
18 services at the time of the imposition of a penalty period, a provider of
19 long-term care services has refused to provide long-term care services
20 to the applicant due to lack of a payment source, and (5) no other
21 person or organization is willing and able to provide long-term care
22 services to the applicant.

23 (c) The commissioner shall not waive the imposition of a penalty
24 period pursuant to subsections (a) and (b) of this section if (1) the
25 applicant made a transfer or assignment of assets to deliberately
26 impoverish such applicant in order to obtain or maintain eligibility for
27 medical assistance, unless the applicant (A) suffers from dementia or
28 other cognitive impairment and cannot explain the transfer or
29 assignment of assets, (B) suffered from dementia or other cognitive
30 impairment at the time the transfer or assignment of assets was made,
31 or (C) was exploited into making the transfer or assignment of assets
32 due to dementia or other cognitive impairment, or (2) the transfer or
33 assignment of assets was made by the applicant's legal representative
34 or the joint owner of the assets, provided such legal representative or
35 joint owner did not exploit the applicant into making such transfer or
36 assignment.

37 Sec. 2. (NEW) (*Effective July 1, 2011*) (a) As used in this section and
38 section 1 of this act, "applicant" means an applicant for or recipient of
39 medical assistance pursuant to section 17b-261 of the general statutes.

40 (b) If the Commissioner of Social Services, in determining an
41 applicant's eligibility for medical assistance pursuant to section 17b-
42 261 of the general statutes, intends to impose a penalty period as a
43 result of a transfer or assignment of assets pursuant to section 17-261 of
44 the general statutes or section 17b-261a of the general statutes, the
45 commissioner shall provide a preliminary notice to the applicant. Such
46 notice shall include a statement that the applicant may file a claim of
47 undue hardship, as defined in section 1 of this act, or provide evidence

48 to rebut the presumption resulting in the imposition of a penalty
49 period pursuant to subsection (a) of section 17b-261a of the general
50 statutes. The applicant shall file such claim or provide such evidence
51 not later than fifteen days after the date on which the preliminary
52 notice is postmarked. The commissioner shall grant one extension of
53 time to file such claim or provide such evidence if requested by the
54 applicant and shall grant additional extensions of time if reasonable.
55 Failure to file a claim of undue hardship under this subsection shall
56 not prohibit an applicant from making a claim of undue hardship at an
57 administrative hearing.

58 (c) If the applicant files a claim of undue hardship pursuant to
59 subsection (b) of this section or provides evidence to rebut the
60 presumption resulting in the imposition of a penalty period pursuant
61 to subsection (a) of section 17b-261a of the general statutes, the
62 commissioner shall provide an interim decision notice to the applicant
63 not later than ten days after receiving such claim or evidence. The
64 interim decision notice shall inform the applicant whether or not (1)
65 the commissioner has determined that undue hardship exists or the
66 presumption has been rebutted, and (2) the penalty period for the
67 transfer or assignment of assets indicated in the preliminary notice
68 shall be waived or shall not be imposed.

69 (d) When the commissioner determines the eligibility of an
70 applicant for medical assistance under section 17b-261 of the general
71 statutes, the commissioner shall provide a final decision notice to the
72 applicant. Such final decision notice shall include (1) a statement
73 confirming any determination the commissioner made with regard to a
74 transfer or assignment of assets pursuant to this section, and (2) a
75 description of the applicant's appeal rights.

76 (e) If an applicant receives notice from a provider of long-term care
77 services that the provider intends to discontinue providing or refuses
78 to provide long-term care services to the applicant because of the
79 imposition of a penalty period against the applicant pursuant to
80 subsection (a) of section 17b-261 of the general statutes or subsection

81 (a) of section 17b-261a of the general statutes, the applicant shall have
 82 no more than sixty days after receiving such notice to file a claim of
 83 undue hardship with the commissioner. Not later than ten days after
 84 receiving such claim, the commissioner shall provide a final decision
 85 notice to the applicant. Such final decision notice shall inform the
 86 applicant whether or not (1) the commissioner has determined that
 87 undue hardship exists, and (2) the penalty period shall be waived.

88 (f) (1) If an applicant is receiving long-term care services in a
 89 nursing home facility, as defined in section 19a-521 of the general
 90 statutes, and the nursing home facility demonstrates that the applicant
 91 is not competent, the commissioner shall grant an extension of time to
 92 claim undue hardship pursuant to subsection (b) of this section to
 93 allow a legal representative to be appointed to act on behalf of the
 94 applicant.

95 (2) The commissioner shall accept any claim filed pursuant to
 96 subsection (b) of this section by a nursing home facility, as defined in
 97 section 19a-521 of the general statutes, and allow the nursing home
 98 facility to represent the applicant with regard to such claim if the
 99 applicant or the legal representative of the applicant gives permission
 100 to the nursing home facility to file a claim pursuant to subsection (b) of
 101 this section.

This act shall take effect as follows and shall amend the following sections:

Section 1	July 1, 2011	New section
Sec. 2	July 1, 2011	New section

Statement of Legislative Commissioners:

In section 2(a), "assistant" was changed to "assistance" to accurately reflect the intent of the bill.

AGE Joint Favorable Subst. C/R

HS

HS Joint Favorable Subst.-LCO

The following Fiscal Impact Statement and Bill Analysis are prepared for the benefit of the members of the General Assembly, solely for purposes of information, summarization and explanation and do not represent the intent of the General Assembly or either chamber thereof for any purpose. In general, fiscal impacts are based upon a variety of informational sources, including the analyst's professional knowledge. Whenever applicable, agency data is consulted as part of the analysis, however final products do not necessarily reflect an assessment from any specific department.

OFA Fiscal Note

State Impact:

Agency Affected	Fund-Effect	FY 12 \$	FY 13 \$
Social Services, Dept.	GF - Cost	See Below	See Below

Note: GF=General Fund

Municipal Impact: None

Explanation

The bill will result in increased Medicaid costs to the Department of Social Services (DSS) associated with waiving a penalty period because of an undue hardship determination. The bill establishes in statute when DSS can and cannot waive such penalty period, which is anticipated to increase the number of individuals eligible for an undue hardship determination. The cost would be determined by the number of individuals, the associated penalty period and the type of service, which is unknown. For illustrative purposes, the average daily rate for a nursing facility is approximately \$190 in FY 11.

The Out Years

The annualized ongoing fiscal impact identified above would continue into the future subject to inflation.

OLR Bill Analysis**sSB 973*****AN ACT CONCERNING THE DETERMINATION OF UNDUE
HARDSHIP FOR PURPOSES OF MEDICAID ELIGIBILITY.*****SUMMARY:**

This bill establishes new and codifies existing circumstances under which the Department of Social Services (DSS) must waive the imposition of a penalty period for certain Medicaid eligibility related asset transfers when such a penalty will create an undue hardship for the person transferring the asset.

The bill also specifies the circumstances under which DSS cannot waive the penalty. The penalty period is a period during which a person is ineligible for Medicaid based on the uncompensated value of the transferred asset.

The bill also establishes and codifies a process that Medicaid applicants (defined as an applicant or recipient) and DSS must follow when an applicant disagrees with DSS' decision to impose a penalty period, DSS' provisions concerning undue hardship are currently covered in its policy manual. Enactment of the bill's provisions supersedes the department's policies.

EFFECTIVE DATE: July 1, 2011

TRANSFER OF ASSETS—UNDUE HARDSHIP EXEMPTION

When someone transfers assets for less than fair market value within five years of applying for long-term Medicaid benefits, the law presumes the transfer was made to qualify for Medicaid. Federal and state laws require DSS to impose a penalty period based on the uncompensated value of the transferred asset. The penalty period can be waived if (1) the applicant can rebut the presumption by clear and

convincing evidence that he or she transferred the assets for some purpose other than Medicaid eligibility, (2) DSS determines that imposing the penalty period will create an undue hardship, or (3) the applicant has dementia.

The bill codifies the requirement that the DSS commissioner must waive the imposition of the penalty period if the penalty would create an undue hardship.

Undue Hardship Defined

Under the bill, an “undue hardship” exists when:

1. the life or health of the Medicaid applicant would be endangered by the deprivation of medical care, or the applicant would be deprived of food, clothing, shelter, or other life necessities;
2. the applicant is otherwise eligible for Medicaid but for the imposition of the penalty period;
3. the applicant is (a) receiving long-term care services at the time the penalty period is imposed, the long-term care provider has notified the applicant that it intends to discontinue providing such services due to nonpayment (Medicaid would stop paying during the penalty period) or (b) is not receiving services at the time the penalty period is imposed and a long-term care service provider has refused to provide services due to the lack of a payment source; and
4. no other person or organization is willing and able to provide services to the applicant.

Current DSS policy sets conditions that must exist for it to waive the penalty. Specifically, it will not impose the penalty period when:

1. the long-term care facility or medical institution has threatened to evict the individual due to nonpayment and the individual has exhausted all legal methods to prevent the eviction, or the medical provider has threatened to terminate home- and

community-based services being provided under a Medicaid waiver;

2. the person transferring the asset establishes that the transferee no longer possesses the asset and has no other assets of comparable value with which to pay the transferor's care costs; and
3. no family member or other individual or organization is able and willing to provide care to the individual (DSS Uniform Policy Manual, § 3029.25) (see BACKGROUND).

When Penalty May or May Not be Waived

The bill prohibits the commissioner from waiving a penalty period if the (1) applicant transfers or assigns assets to deliberately impoverish himself or herself to obtain Medicaid eligibility or (2) applicant's legal representative or the assets' joint owner transfers or assigns the asset, provided these individuals did not exploit the applicant in the process.

The bill essentially restates the law (CGS § 17b-261a(c)) that permits the commissioner to waive the imposition of the penalty period when the applicant (1) suffers from dementia or other cognitive impairment and cannot explain the transfer, (2) suffered from such an impairment at the time the transfer or assignment of assets was made, or (3) was exploited into making the transfer due to such an impairment.

PROCESS FOR IMPOSING PENALTY PERIOD

Notice and Extensions

If the commissioner intends to impose a penalty period as a result of an asset transfer or assignment, he must provide a preliminary notice to the applicant. (DSS policy already requires this.) The notice must include a statement that the applicant can file an undue hardship claim or provide evidence to rebut the presumption, which the applicant must do within 15 days from the notice's postmark date. (The DSS policy manual requires this within 10 days.)

The bill requires the commissioner to grant one extension if the applicant requests one and must grant additional extensions, if “reasonable.” (The policy allows for an extension if the request is reasonable.)

Failure to file a claim of undue hardship at this juncture does not, under the bill, prevent an applicant from making an undue hardship claim at an administrative hearing (see below).

DSS Decision Whether Undue Hardship Exists

Under the bill, if the applicant files an undue hardship claim or provides evidence to rebut the presumption, the commissioner must provide an interim decision notice to him or her within 10 days of receiving the claim or evidence. The notice must indicate whether the commissioner finds for the applicant and agrees that the penalty period should be waived or not imposed. (This essentially mirrors current DSS policy.)

When the DSS commissioner determines Medicaid eligibility, the bill requires him to provide a final decision notice to the applicant. The notice must include a statement confirming any determination he has made with respect to an asset transfer and describing the applicant’s appeal rights. (The DSS policy manual indicates that DSS sends a final decision notice regarding the undue hardship claim or rebuttal issue at the time it sends notice of its disposition of the Medicaid application. The notice contains all the elements of the preliminary notice and a description of the individual’s appeal rights.)

WHEN LONG-TERM CARE PROVIDER INTENDS TO CEASE PROVIDING SERVICES

Under the bill, if a long-term care provider notifies the applicant that it refuses to provide, or will no longer provide, services to a Medicaid applicant due to a penalty period being imposed, the applicant can appeal the refusal by filing an undue hardship claim with DSS within 60 days after receiving the notice. The commissioner must provide a final decision notice to the applicant within 10 days after receiving the claim. The notice must inform the applicant whether

undue hardship exists and the penalty will be waived.

WHEN APPLICANT IS RECEIVING CARE IN NURSING HOME FACILITY AND IS INCOMPETENT

Under the bill, if an applicant is a resident of a nursing home facility and the facility demonstrates that the applicant is not competent, the commissioner must grant an extension of time for undue hardship claims to allow a legal representative to be appointed on the applicant's behalf. (The bill defines a "nursing home facility," by reference, as a nursing home or residential care home, though residential care home services are not covered by the Medicaid program.)

The commissioner must accept any undue hardship claim that a nursing home facility files and allow the facility to represent the applicant regarding the claim if the applicant or his or her legal representative gives the home permission to do so. (The policy manual allows the applicant to give permission for the long-term care facility to file an undue hardship claim on his or her behalf.)

BACKGROUND

Transfer of Assets — Federal Law

Until 2006, federal law allowed an exemption from the asset transfer penalty if it would cause undue hardship, but it did not establish procedures for determining hardship. The 2005 Deficit Reduction Act (DRA) provided more guidance to states. It requires penalty period waivers if states find that the penalty would deprive the applicant of medical care to the extent that his or her health or life would be endangered or he or she would be deprived of food, clothing, shelter, or other life necessities. The federal Centers for Medicare and Medicaid Services had previously provided these criteria to states in the State Medicaid Manual.

The 2005 act further requires states to provide for (1) notice to recipients that an opportunity for a hardship exception exists, (2) a timely process for determining whether a waiver will be granted, and

(3) a process for appealing an adverse determination. It permits nursing facilities to file the hardship waiver applications on the resident's behalf, with consent (42 USC § 1396p(c)(2)(D)).

Status of DSS Regulations and DSS Policy Manual

In April 2007, DSS published notice of intent to adopt regulations to carry out the DRA provisions, and included the provision defining undue hardship that the bill proposes to change. Based on concerns about a portion of the proposed regulations regarding waiving the penalty period, and advice from the Legislative Commissioners Office as to their compliance with federal law, the Regulations Review Committee rejected the regulations. DSS never resubmitted them.

The legislature has granted DSS the authority to implement policies and procedures to carry out statutory requirements while in the process of adopting them in regulation (DSS Uniform Policy Manual, §§ 3029.25, 3029.30, and 3029.35).

COMMITTEE ACTION

Aging Committee

Joint Favorable Substitute Change of Reference

Yea 11 Nay 0 (03/10/2011)

Human Services Committee

Joint Favorable

Yea 18 Nay 0 (03/22/2011)